

**STATEMENT BY
THE AMERICAN FARM BUREAU FEDERATION
TO THE
HOUSE COMMITTEE ON AGRICULTURE

REGARDING**

TEMPORARY AGRICULTURAL LABOR REFORM ACT OF 2003 (HR 3604)

January 28, 2004

**Presented by
Larry Wooten
President,
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Chairman Goodlatte, members of the Committee, good morning, my name is Larry Wooten. I am President of the North Carolina Farm Bureau (NCFB). On behalf of the American Farm Bureau Federation (AFBF), I appreciate the opportunity to testify on the very important and timely issue of immigration reform. This is a priority issue for Farm Bureau. We appreciate your considerable efforts on this issue and look forward to working with you further as the debate expands. H.R.3604 contains many provisions that are consistent with our policy objectives and we support your efforts.

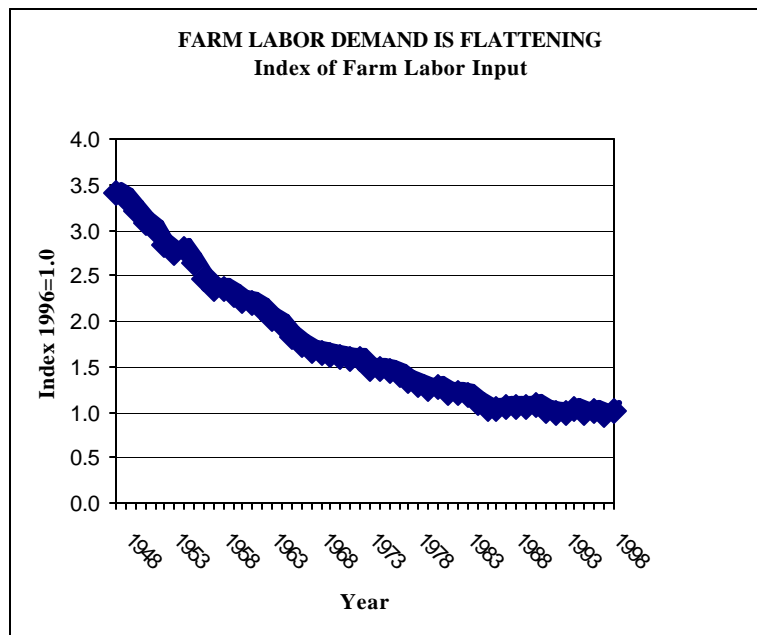
HR 3604 would reform the H-2a agricultural temporary worker program by replacing the minimum wage, the Adverse Effect Wage Rate (AEWR), with the market-based prevailing wage rate; replacing the approval process with one where the employer can simply attest to the need for workers; allowing the employer to provide the employee with a housing voucher in lieu of housing under certain circumstances; providing for the U.S. Department of Labor (DOL) to resolve disputes between employee and employer; and providing a one-time opportunity for currently unauthorized farm workers to earn legal work authorization as temporary workers if they come forward, return home and obtain approval to become H-2a workers.

H-2a reform has long been a priority of Farm Bureau. Earlier this month at AFBF's annual meeting, our farmer delegates discussed the issue extensively. We adopted policy that states that an agricultural temporary worker program should include the following elements: a market-based minimum wage; an approval process that efficiently matches foreign workers with employers when no Americans can reasonably be found to fill the job opening; an end to the frivolous litigation that plagues the H-2a program; and adequate worker protections and conditions. We also modified policy to recognize that different proposals pending in Congress address unauthorized farm workers differently.

BACKGROUND

Farm Labor Demand Is Not Declining

During the last century, demand for farm labor declined dramatically as technology improved.¹ Between 1950 and 1986, farm labor requirements dropped by two-thirds. It took more than three workers in 1950 to do what one could in 1986. Since the mid-1980s however, the employment decline has not only slowed but also come almost to a stop, with the index of farm labor input hovering between 1.06 and 0.98 from 1986 to 1999.² In other words, agriculture's reliance on farm labor has not changed for over a decade. At the turn of the 21st century we had about as many workers as 15 years before.

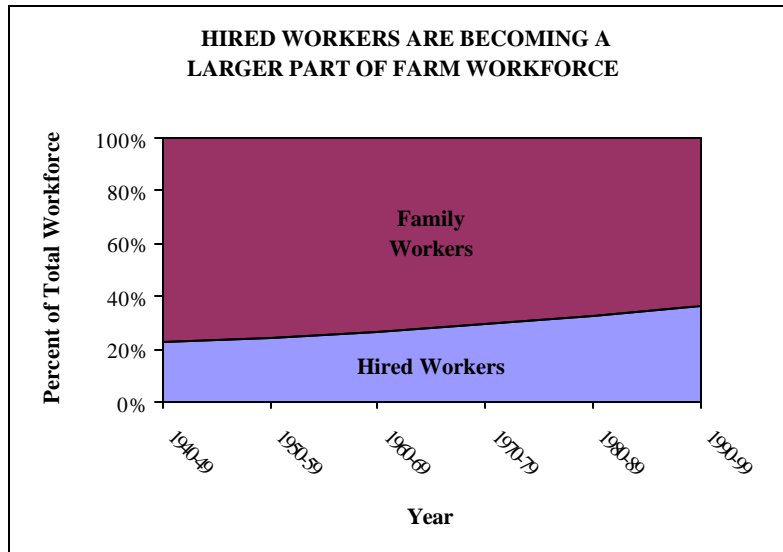


Supply is Shifting Toward Hired Workers

While the U.S. farm labor demand has not declined, the supply traditionally has come directly from the families involved. In the 1940's, nearly 80 percent of farm labor came from within the family. Over time, this has shifted somewhat toward more hired labor. Hired workers represented approximately a third of total farm employment in the 1990s.

¹ Runyan, Jack. "Hired Farmworkers' Earnings Increased in 2001 But Still Trail Most Occupations," Rural America, Vol. 17, No. 3 (2002), Table 1.

² Ahearn, Mary, et al. 1998. Agricultural Productivity in the United States. USDA Economic Research Service, Agricultural Information Bulletin No. 740.



Fewer Hired Workers Are Work Authorized

The Immigration Reform and Control Act of 1986 (IRCA) made it illegal for employers to knowingly employ workers that are not authorized to work in the United States. Yet over half of farm workers (52 percent) admitted to being employed without authorization according to DOL's latest survey.³

The reason is IRCA prohibits employers from taking further action to verify the employment eligibility of a worker -- authorized or otherwise, once the worker presents identification that reasonably appears genuine on its face. Unless the document is obviously fraudulent, the employer cannot legally request additional information without risking a discrimination lawsuit.

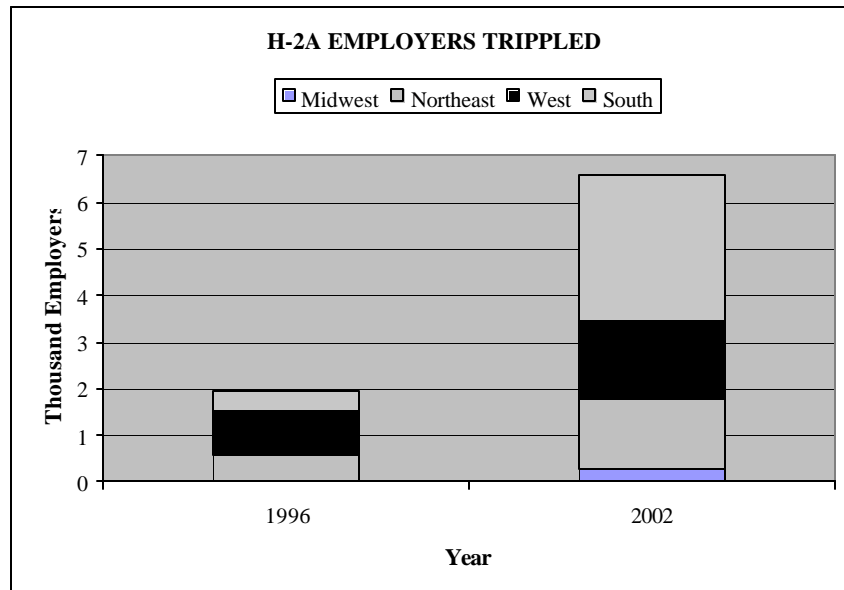
Agriculture Is Experiencing Localized Labor Shortages

Before DOL will authorize an employer to recruit H-2a workers, considerable effort is made to ensure that no American is available to fill these positions. The grower must advertise his or her job openings in major cities. DOL will also help recruit, looking out of state, even into Puerto Rico. As such, where there is H-2a use there is strong evidence of localized domestic labor shortages.

There has been a major growth in the number of farms using H-2a workers. Overall farm numbers moved from 1,930 in 1996 to 6,608 by 2002. This represents a 242 percent rise. The regional shifts are even more dramatic. Western states held the majority of H-2a operations in 1996, with 931 farms. This was nearly double the number of operations in the Northeast, the second place region. The South came in third at 405 operations, and the Midwest – a very distant fourth – with only 15 farms. The numbers for 2002 are

³ U.S. Department of Labor, National Agricultural Worker Survey, 1998.

significantly different. Southern farm numbers using H-2a workers have jumped to 3,175 operations – a 684 percent increase, which drops the West into second place. Numbers there are up 77 percent to 1,645 operations. The Northeast has also seen a higher growth rate from a significant base, now reaching 1,513 farms. Midwest farm numbers using H-2a are up a whopping 1,700 percent to 275 farms, but from a much smaller base number, 15.



Farm labor shortages appear to be expanding. Eighteen states began using H-2a between 1996 and 2002. Those states are: New Jersey, Mississippi, West Virginia, Delaware, Pennsylvania, Indiana, Michigan, Minnesota, Ohio, Wisconsin, Arkansas, Louisiana, North Dakota, South Dakota, Iowa, Hawaii, Alaska.

Two farm types tend to dominate H2a labor needs, tobacco and fruits and vegetables. Tobacco operations used 9,756 H-2a workers in 1996, jumping to 14,917 in 2002 – a 53 percent increase. Fruit and vegetable production saw a 106 percent boost moving from 5,452 to 11,244 by 2002. However, livestock and dairy operations have rose similarly to tobacco, growing by 48 percent between the two time periods. In grains production the numbers show the largest percentage growth. In 1996 only 135 H-2a workers were employed. That number jumped to 899 in 2002 – a 566 percent increase.

Farm Labor Shortages Could Become Widespread

In 1997, the Social Security Administration (SSA) began reviewing employer tax filings for listed employee names or social security numbers that do not match agency records. Mismatch notifications have exposed law-biding growers to liability under IRCA if it provides knowledge of unauthorized farm workers. If the Department of Homeland Security Immigration and Customs Enforcement (ICE), formerly the INS, begins targeting employers with mismatches, agriculture may be faced with replacing a significant portion of its workforce, which could lead to immediate widespread shortages.

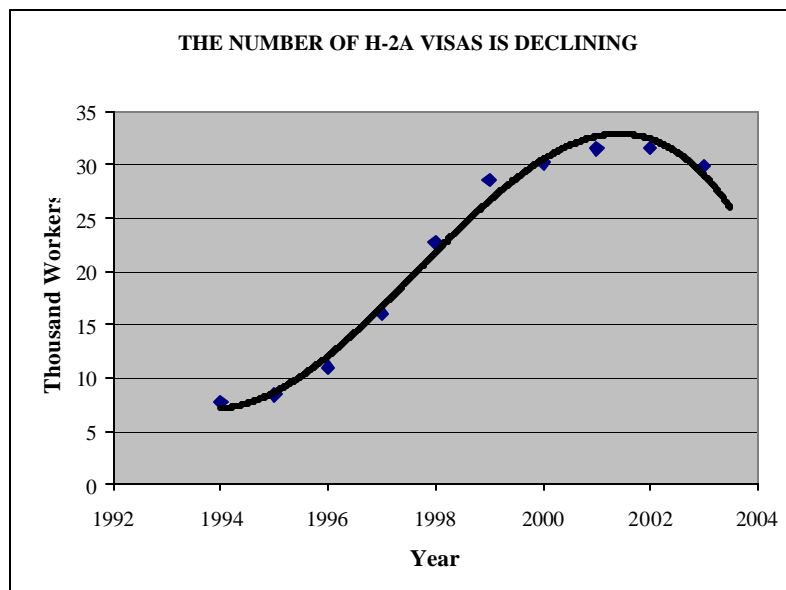
While agriculture has historically not been a major target of ICE/INS enforcement efforts, we have had some experience. Last Fall Vermont dairy farmers woke up one morning to find that ICE had raided during the night, and detained their workers. Georgia onion growers were targeted a few years ago. With the increasing focus on homeland security since September 11th 2002, and as the Homeland Security Department becomes better organized and funded, AFBF expects more raids.

Americans Are Unlikely To Fill Farm Labor Shortages

Agricultural labor is arduous and seasonal, making it difficult to sustain year round employment. Variations in wages and distances often make farm work a relatively less attractive option for legal American workers.

The H-2a Program Is Broken

Because of the cost and inflexibility of H-2a, use has historically been low. Nevertheless until recently, use was rising. According to the State Department the number of H-2a visas went from 8,000 in 1995 to 32,000 in 2001 – a four-fold increase. This year, the number declined by about one thousand, down to approximately 31,000. Unless the H-2a program is significantly reformed, we expect further declines.



ANALYSIS

HR 3604 would make the H-2a program more affordable and flexible. It replaces H-2a's minimum wage, the AEWR, with a market-based, prevailing wage rate. The AEWR is calculated by averaging statewide the wages of more skilled workers with those of less skilled workers. The minimum wage for rural H-2a strawberry pickers is thus based on

the wages of non-H-2a tractor mechanics in more urban areas, as one example. Under a prevailing wage standard, on the other hand, the minimum wage for those strawberry pickers would be based only on the wages of strawberry pickers in the immediate area.

In addition to paying the AEWR H-2a employers must also provide housing to workers at no cost, guarantee payment of three quarters of the wages promised regardless of crop harvest problems, reimburse travel expenses which can be very costly – all benefits other employers do not typically provide. HR 3604 would help lower these costs by allowing farm employers to offer housing vouchers in lieu of housing when a state's Governor determined that there was sufficient housing available.

Another problem is that H-2a workers are often not available when growers need them. For several years the General Accounting Office has repeatedly reported that DOL has failed between 33 and 40 percent of the time to act on applications in a timely manner. DOL failed either to approve or disapprove these applications even though they were submitted as much as two months in advance. Frequently, farm operators were promised large numbers of workers but were left without workers at harvest time and with many acres of perishable crops to harvest.

HR 3604 would address worker delays by replacing the cumbersome certification process that has served as a barrier to entry and replacing it with a process similar to the one used by another temporary worker program, the H-1b program. Farmers would simply attest to the need for temporary workers and agree to abide by the conditions for using H-2a. Unless the application is not complete or there are obvious inaccuracies, DOL has to approve it. At the same time, H.R. 3604 includes significant safeguards to ensure that American workers are not displaced. Before obtaining DOL's authorization, a grower must demonstrate to the agency positive recruitment efforts to find Americans to fill the job opening for which the employer is seeking an H-2a worker. In the unlikely event that an American seeks farm work but is not hired, the legislation provides DOL with significant new authority to levy fines, bar employers from H-2a program participation, and take the employer to court.

Legal Service Corporation (LSC) abuses against farm employers have been well documented.⁴ The courts are often overworked, understaffed or not well equipped to handle the cases, whereas LSC is federally funded. DOL is frequently in a better position to separate legitimate worker claims from less legitimate ones. H.R. 3604, therefore, protects farm workers without exposing growers to additional frivolous lawsuits by providing DOL with the authority it needs to resolve disputes.

The aforementioned reforms are essential for a workable agricultural temporary worker program. However, not every farmer would benefit from these reforms, so we would ask the committee to consider the following issues as the legislative process proceeds:

⁴ Isacc, Rael Jean. 1996. Harvest of Injustice: Legal Services vs. The Farmer. National Legal and Policy Center: Vienna, VA.

- 1) Allow year-round employers on temporary basis. Under H-2a, any grower may recruit foreign workers only if they are employed on a “seasonal” or “temporary” basis. Yet in some states, DOL automatically rejects applications for temporary workers by year-round employers. DOL also prohibits H-2a workers from staying longer than 10 months a year, because that is the maximum length of time that an administrative law judge has been willing to grant temporary H-2a workers.⁵ However, there are legal, appropriate and temporary uses for which 10 months may not be enough and we would encourage the committee to define temporary as a stay of less than or equal to 11 months per year.
- 2) Eliminate the “50 percent” rule. The rule requires H-2a employers to hire any available worker during the first half of the contract period. Part of the problem is that farm worker advocates withhold domestic workers until H-2a workers arrive. If the employer sends the H-2a worker home, and the domestic worker quits (which occurs often), the employers is forced either to maintain two workers on the payroll when there is only enough work for one, or to send one home and possibly have to reapply for certification, which is especially a problem in the highly perishable crops. H.R. 3604 would prohibit any one from deliberately withholding “American” workers. Given the significant new safeguards to protect American workers, the committee could also safely eliminate or reduce the 50 percent rule without displacing them.
- 3) Travel Reimbursements. H.R. 3604 attempts to provide important flexibility for H-2a travel reimbursements by codifying DOL regulations mandating that farmers reimburse H-2a workers’ inbound transportation and subsistence expenses only after half of the contract is complete. Unfortunately, the 11th U.S. Circuit Court of Appeals decided in *Arriaga v. Florida Pacific Farms and Sleepy Creek Farms*, that Florida growers were liable under the Fair Labor Standards Act (FLSA) for not reimbursing those costs in the first workweek. Additionally, the court entitled the workers, for the first time, to payment for visas and passports, despite State Department regulations. The court ruled that growers have to reimburse these expenses from the employees’ home villages, not just from the home countries’ consulates. AFBF would encourage the committee to clarify that the FLSA does not supercede the H-2a law in this case and that inbound travel by H-2a workers does not primarily benefit the employer, considering that the employee benefits equally from having a job.

CONCLUSION

In the 108th Congress, a dozen members of Congress have introduced legislation to create or reform a temporary worker program and provide unauthorized workers with a path to legal status. A few weeks ago President Bush announced his own initiative, and urged Congress for support in his State of the Union address last week. Mr. Chairman, we view all of these legislative efforts as a positive step forward, and believe they all raise the

⁵ Please see http://www.oalj.dol.gov/public/ina/DECSN/2000_00012.tlc.pdf.

level and quality of the debate and will contribute to the momentum building behind it. We welcome these efforts, and look forward to working with Congress to ensure that agriculture's concerns, which are unique, are adequately addressed.

When AFBF first began working for H2a reform nearly 10 years ago, there was little interest in Congress. In recent years we have worked with Senator Larry Craig (R-Idaho) and Congressman Chris Cannon (R-Utah) to develop comprehensive H-2a reform legislation that currently enjoys wide, bipartisan support in Congress. Mr. Chairman, your legislation, H.R. 3604 adds to this debate and contains much that we agree with and support. We encourage your continued involvement in this debate and look forward to working with you in the months ahead. Thank you again for the opportunity to speak to the Committee on this important and priority issue for Farm Bureau. I would be pleased to answer any questions you may have.